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WHITE HOUSE PROPOSES TO STREAMLINE ENVIRONMENTAL REVIEWS FOR INFRASTRUCTURE PROJECTS

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On February 12, 2018, the White House released a set of proposals to streamline the federal environmental review process for infrastructure projects. The streamlining proposals were included in a 55-page "Legislative Outline for Rebuilding Infrastructure in America." While chances for comprehensive infrastructure legislation are uncertain at best, the streamlining proposals are an important indicator of the Administration's policy direction and could be influential in shaping future legislation.

Background

The issue of environmental streamlining has been the subject of legislative and administrative reform efforts for more than a decade. Congress enacted environmental streamlining measures for highway and transit projects in SAFETEA-LU in 2005, in MAP-21 in 2012, and in the FAST Act in 2015. In addition, Presidents of both parties have sought to streamline environmental reviews through executive orders, including President George W. Bush (Executive Order 13274), President Obama (Executive Order 13604), and President Trump (Executive Order 13807).

These previous efforts yielded several statutory changes that have become familiar to practitioners involved in environmental reviews for transportation projects, including the environmental review process under 23 USC 139; findings of *de minimis* impact under Section 4(f) of the USDOT Act; and assignment of FHWA responsibilities to States

under 23 USC 326 and 327. In addition, the project permitting "dashboard" was established by Presidential directive and later mandated by the FAST Act.

White House Proposals

The White House's proposals are wide-ranging in scope, touching on many aspects of the federal environmental review process. The following summary highlights key proposed changes in several areas, including several that specifically modify the environmental review process for transportation projects.

Two-Year Timeframe; One Federal Decision

The proposed legislation would establish a two-year period to complete the environmental review process. This period includes 21 months to finish the National Environmental Policy Act (NEPA) process, plus three months for federal permit approvals to be issued. The plan provides that "appropriate enforcement mechanisms" be developed to ensure permitting decisions are issued on time. It is unclear what exceptions, if any, are contemplated in the Administration's legislative proposal.

Even in the absence of legislation, federal agencies are in the process of implementing Executive Order 13807, which also calls for a two-year process and a single federal decision. An inter-agency group is working to develop guidance, which should provide greater insight into the ways that federal agencies will seek to achieve faster review times while also achieving a single federal decision.

Reduction in Federal Agency Roles

The proposed legislation would reduce, in some cases substantially, the roles of federal environmental agencies in the environmental review process. Changes include:

- Eliminating the statutory provision - Section 309 of the Clean Air Act - that gives EPA the responsibility to comment on all environmental impact statements.
- Amending Section 404 of the Clean Water Act to eliminate EPA's authority to "veto" Section 404 permits under the Clean Water Act.
- Amending Section 404 of the Clean Water Act to provide that the Corps of Engineers, not EPA, has the final authority to make jurisdictional determinations for "waters of the United States." The EPA would continue to be involved in rulemakings that establish the legal standards for making these jurisdictional determinations.
- Requiring federal agencies to limit any comments they submit in the NEPA process to issues within their expertise or jurisdiction.
- Amending Section 4(f) to eliminate the requirement for USDOT agencies to seek comments from the U.S. Department of the Interior under (and in some cases the Departments of Agriculture and/or Housing and Urban Development) when approving projects that "use" land from historic sites and parkland.

- Eliminating the requirement to obtain National Park Service approval for replacement parkland for projects that use lands from parks protected under Section 6(f) of the Land and Water Conservation Fund Act.

Range of Alternatives

The proposed legislation would clarify that alternatives "outside the scope of an agency's authority or an applicant's capability" are not reasonable alternatives for purposes of NEPA and therefore do not need to be considered in detail. This change is intended to focus resources and analyses on those alternatives that are "actually legally, technically, and economically feasible."

Expanded Flexibility to Use CEs

The proposed legislation would allow any federal agency to rely upon a categorical exclusion (CE) issued by any other federal agency. There is a provision in existing law that provides this flexibility on a limited basis: under 49 USC 304, one USDOT agency can apply another USDOT agency's CE, but only for a "multimodal" transportation project. The White House proposal would provide general authority for any federal agency to apply a CE that has been adopted in the procedures of any other federal agency.

Exemption for Projects with "Minimal" Federal Funding

The proposed legislation would exempt certain surface transportation and water infrastructure projects from federal requirements when the federal share of the project's funding is "minimal." By defining such projects as non-federal, the need for NEPA review would be avoided. The Plan, however, does not identify the specific funding percentage above which a project would be considered a federal action.

Streamlining Proposals Specific to Transportation Projects

Several of the legislative proposals specifically address aspects of the environmental review process for transportation projects. These include:

- Allowing design-build contractors to conduct final design activities prior to completion of the NEPA process.
- Allowing railroad right-of-way to be acquired for all railroad projects prior to completion of the NEPA process.

- Eliminating the provision in 23 USC 168 that requires the lead agency to obtain "concurrence" of participating agencies when adopting transportation planning decisions and analyses for use in the NEPA process.

- Clarifying that transportation conformity requirements apply only to the most recent National Ambient Air Quality Standard (NAAQS) for a pollutant, when EPA

has promulgated a new NAAQS to replace a previous NAAQS for the same pollutant.
- Postponing the applicability of transportation conformity requirements in newly designated nonattainment areas until after motor vehicle emissions budgets have been developed and approved by EPA for that area.
- Allowing Section 4(f) requirements for historic properties to be satisfied by entering into a negotiated agreement as part of the Section 106 consultation process under the National Historic Preservation Act. (The proposal does not specify what type of agreement, or who would need to be a party to that agreement.)
- Providing States with authority to assume some or all of FHWA's responsibilities for approval of right-of-way acquisitions, subject to the same legal protections that currently apply to the right-of-way acquisition process.
- Allowing States to assume USDOT's responsibilities for air quality conformity determinations as part of the NEPA assignment program under 23 USC 327. The statute currently includes an explicit prohibition on assigning air quality conformity determinations.
- Allowing States to assume USDOT's responsibilities for certain determinations regarding floodplains and noise policies as part of the NEPA assignment program under 23 USC 327. Currently, FHWA considers these determinations to be non-environmental responsibilities and thus beyond the scope of the assignment program.

Judicial Review

The proposed legislation would make several important changes to the federal courts' role in reviewing federal agencies' actions in the environmental review process, including:

- establishing a uniform 150-day statute of limitations for actions challenging federal approvals of infrastructure projects, which is consistent with the current period for highway and transit projects, but is much shorter than the multi-year periods that currently apply to most other types of infrastructure projects;
- limiting the circumstances under which courts can grant injunctions halting project activities; and
- precluding judicial review for claims alleging that project data has become outdated, if the federal agency has followed its own guidance regarding "currentness" of data.

Pilot Programs

The proposed legislation would establish two pilot programs: (1) a performance-based pilot, which would allow "environmental performance measures" to be used instead of an environmental review process to address environmental impacts of an infrastructure project; and (2) negotiated-mitigation pilot, which would allow "negotiated mitigation agreements and supporting mitigation markets" to be used to address a project's environmental impacts in lieu of using the environmental review process.

What's Next?

The timing of an "infrastructure bill" remains uncertain, and it has been reported that Congress will likely consider distinct bills addressing various sectors, rather than a single comprehensive infrastructure bill. If and when a surface transportation bill moves forward, it will likely include environmental streamlining provisions in some form.

Regardless of whether legislation is enacted, the Council on Environmental Quality and other federal agencies will continue implementing Executive Order 13807, including the requirement for a two-year process and one federal decision. In addition, FHWA and other federal agencies may issue their own guidance for complying with the Executive Order, and may propose other streamlining changes that can be accomplished without legislation.

THE UNCERTAIN FUTURE OF INCIDENTAL TAKE UNDER THE MIGRATORY BIRD TREATY ACT

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The Migratory Bird Treaty Act ("MBTA"), despite being over 100 years old, has been the focus of judicial, executive, and legislative action in recent years. 16 U.S.C. §§ 703–712. The result of these actions is that the predictability of interpretation and enforcement risk under the MBTA is a moving target. Most of the activity has focused on determining whether incidental take of migratory birds, eggs, or nests is a violation of the MBTA. Regulatory uncertainty around incidental take continues to be a concern; the MBTA is a strict liability criminal statute, no permit program exists to authorize incidental take, and migratory birds and potential habitats are ubiquitous throughout the United States. The Trump Administration has recently taken action to resolve that uncertainty through the issuance of a Memorandum Opinion. This Memorandum Opinion, however, is not as durable as other legislative, regulatory, or judicial solutions.

Trump M-Opinion and Related Activity

In December of 2017, the U.S. Department of the Interior ("DOI") Principal Deputy Solicitor, exercising the authority of the Solicitor, issued a Memorandum Opinion, M-37050, entitled "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take." This Memorandum Opinion ("Trump M-Opinion") reversed DOI's longstanding position that the MBTA prohibits non-purposeful "take" of migratory birds, nests, and eggs that occurs incidental to activities. The DOI's previous position—that the MBTA's "take" prohibition does extend to incidental take—was most comprehensively enunciated in the January 2017 DOI Memorandum of the prior Solicitor, M-37041 ("Obama M-Opinion"), that DOI issued during the final days of the Obama Administration. Almost immediately after inauguration, the Trump Administration suspended and temporarily withdrew the Obama M-Opinion. Memorandum to the Acting Solicitor of the U.S. Department of the Interior from Acting Secretary of the U.S. Department of the Interior, "Temporary Suspension of

Certain Solicitor M-Opinions Pending Review" (Feb. 6, 2017). The Trump M-Opinion fully reversed the DOI's position with regard to incidental take.

The Trump M-Opinion closely aligns with the most recent Circuit Court of Appeals decision on the topic of whether or not incidental take is prohibited by the MBTA. In 2015, the Fifth Circuit ruled in *U.S. v. Citgo Petroleum Corp.* that the MBTA prohibits only those acts that are conducted deliberately, directly, and intentionally to migratory birds, and that the MBTA was never intended to criminalize migratory bird deaths caused unintentionally and indirectly. 801 F.3d 477 (5th Cir. 2015). The Trump M-Opinion also takes a comprehensive look at the social context of the MBTA's genesis, its legislative history, rules of statutory interpretation, and constitutional due process considerations.

Despite providing comprehensive support for its position, the Trump M-Opinion's lasting impact on enforcement of the MBTA is uncertain. The Trump M-Opinion is a thorough statement of the DOI's interpretation but is not codified in law or regulation, nor does it resolve the long-standing Circuit split on this issue. Although the DOI's interpretation of its own statute would certainly be persuasive to courts interpreting and applying the MBTA, a court is not bound to accept DOI's interpretation as laid out in the Trump M-Opinion. One would expect a court to give the Trump M-Opinion *Skidmore* deference at best, which is significantly less deferential than *Chevron* and *Auer* deference. Without a more durable effort to establish its position, the Trump M-Opinion can be suspended or withdrawn as quickly as was the Obama M-Opinion during the next change in administrations.

It is possible that legislative or regulatory action will yet be taken during this administration to more strongly solidify the interpretation that the MBTA does not extend to incidental take. On the legislative side, an amendment added by Rep. Liz Cheney (R-WY) to the "SECURE American Energy Act" (H.R. 4239) would clarify that the MBTA does not prohibit incidental take. H.R. 4239 has been reported from the House Natural Resources Committee but has not yet been scheduled for floor action. The DOI could also elect to promulgate a regulation clearly defining the MBTA "take" prohibition to be limited to direct, purposeful "take." It is also possible that this issue of statutory interpretation could eventually reach the U.S. Supreme Court, if DOI were to finalize a regulation that was subsequently challenged or if another Circuit Court of Appeals were to hear a challenge of an enforcement action for incidental take, prompting the Supreme Court to resolve the Circuit split.

Other executive branch documents influence MBTA policy and impact the risk of MBTA enforcement irrespective of the Trump M-Opinion or the Obama M-Opinion. Most notably, at the end of the Clinton Administration in 2001, President Clinton issued Executive Order 13186 on migratory birds, "Responsibilities of Federal Agencies to Protect Migratory Birds" ("Clinton EO"), which directed federal agencies that are likely to have a measurable negative effect on migratory bird populations to develop and implement Memoranda of Understanding ("MOUs") with the U.S. Fish and Wildlife Service ("USFWS") to promote conservation of migratory bird populations. Although the Clinton

EO did not change the MBTA definition of "take" to include incidental take, its implication is that impacts to migratory birds that occur incidentally are regulated by the MBTA.

While the Clinton EO and resultant MOUs extend solely to federal agencies, the MOUs can impact public and private projects requiring funding or approvals from those federal agencies. For example, the Federal Energy Regulatory Commission ("FERC") developed an MOU with USFWS under the Clinton EO which commits FERC, where appropriate, to require avoidance and minimization measures and mitigation for migratory bird impacts. Only eleven federal agencies are listed as having established MOUs consistent with the Clinton EO. Neither the Federal Highway Administration ("FHWA") nor the U.S. Department of Transportation ("USDOT") is included among those agencies.

Transportation Agencies and the MBTA

Federal and state transportation agencies have the potential to impact migratory birds, nests, or eggs as a result of roadway construction, maintenance projects, and regular right-of-way ("ROW") maintenance. While DOI's current position is that the MBTA "take" prohibition does not extend to incidental take resulting from unintentional or indirect impacts, neither *Citgo* nor the Trump M-Opinion speak explicitly to whether the deliberate clearing of trees and vegetation during nesting season when the presence of nests is not verified would constitute "take" under the MBTA. Notably, the MBTA provides a permit pathway for active nest removal where nests will be deliberately possessed or destroyed while the nests are active. 50 C.F.R. § 21.27. Deliberate actions such as clearing land or engaging in roadway construction or ROW maintenance that impact migratory birds, eggs, or nests do not have as their purpose any impacts on migratory birds and are arguably incidental in nature. That said, arguments to the contrary and associated enforcement risks remain. Unless and until the Supreme Court resolves the Circuit split or legislation clarifies the meaning of the MBTA "take" prohibition, the regulatory certainty for project proponents is higher in Circuits that have held that incidental take is not prohibited by the MBTA (5th, 8th, 9th), than it is in Circuits that have ruled otherwise (2nd, 10th) or have not ruled on the issue.

Enforcement based upon incidental take is not anticipated to be a priority during the Trump administration, consistent with the Trump M-Opinion. However, the time horizons of many projects' financing and operations will extend long beyond the current administration. Therefore potential fluctuations in interpretation (and any future M-Opinions on the subject) bear upon calculations of enforcement risk in various parts of the country. Although unlikely to occur during the current administration, should FHWA or USDOT develop MOUs with USFWS pursuant to Clinton EO, then migratory bird considerations could arise independent of and despite the Trump M-Opinion. While the Trump M-Opinion makes clear that DOI's enforcement priorities are not focused on incidental take under the MBTA, without a more durable legislative, judicial, or regulatory action, that position could quickly change when the political climate shifts, leaving longer term projects still in enforcement limbo.

Editor's Note: Whatever your position on incidental takes under the MBTA may be, the Trump M-Opinion makes interesting historical and political reading.

AIR QUALITY ANALYSIS DERAILS BNSF CALIFORNIA PROJECT

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The timeline for constructing transportation projects can be significant. And with the complexities of the California Environmental Quality Act ("CEQA"), years of analysis is not always synonymous with adequate analysis. On January 12, 2018, the California Court of Appeal for the First Appellate District informed the City of Los Angeles ("City") and BNSF Railway Company ("BNSF") that despite more than six years of analysis, the Final Environmental Impact Report ("FEIR") for BNSF's proposed rail yard project failed to adequately consider the project's environmental impacts. (*City of Long Beach et al. v. City of Los Angeles et al.*, Case No. A148993.) Specifically, the Court of Appeal found that the FEIR's analysis of the project's air quality impacts was deficient. The Court of Appeal's decision was not all doom and gloom, however, as the Court rejected a number of other challenges to the FEIR, and provided a roadmap for addressing some of the deficiencies related to the air quality analysis.

Background

The Ports of Long Beach and Los Angeles ("Ports") handle approximately 35 percent of all oceanic shipping in the United States. The majority of these goods are shipped via containers, which are off-loaded and then transported by truck, rail, or a combination thereof. To facilitate transportation by rail, there are a handful of rail yards operating at the Ports, one rail yard located offsite but in close proximity to the Ports, and two rail yards located approximately 24 miles from the Ports. Due to logistical considerations, the rail yards located furthest away, one of which is owned by BNSF, handle the majority of the containers. In order to transport the containers from the Ports to the offsite rail yards, the containers are loaded onto trucks.

In September 2005, a notice of preparation and initial study for a new BNSF rail yard located approximately four miles from the Ports was released. The following month, a supplemental notice of preparation was issued. In September 2011, a draft environment impact report for the project was released. The following year, a recirculated draft environmental impact report was released. And, in February 2013, the FEIR for the project was released. The FEIR stated that the project would have the capacity to handle an estimated 1.5 million intermodal containers per year at full operation and would generate approximately 2 million trips between the new facility and the Ports. In May 2013, the City Council approved the project.

In June 2013, seven petitions were filed in Superior Court challenging the approval of the project, including one by the City of Long Beach. Eleven months later, pursuant to a stipulation, the Attorney General intervened in the litigation. In March 2016, the Superior Court issued a peremptory writ of mandate ordering the City to set aside its

project approval until it complied with CEQA. In support of this decision, the Superior Court found that the FEIR's project description was deficient, along with the FEIR's analysis of indirect impacts and growth-inducing impacts, noise, traffic, air quality, Greenhouse gas emissions, and cumulative impacts. The Superior Court also found that the mitigation measures were inadequate. The City and BNSF timely appealed. While the Court of Appeal affirmed the Superior Court's ultimate decision, it also reversed the Superior Court's findings with respect to the FEIR's project description, and analysis of indirect impacts, growth inducing impacts, noise, traffic, and Greenhouse gas emissions. Instead of addressing all of these issues, many of which were not certified for publication, this article focuses on the Court of Appeal's analysis of the exhaustion issue, indirect impacts, Greenhouse gas emissions, and air quality.

Exhaustion is Not for Everybody

CEQA contains a number of procedural requirements that if ignored ordinarily doom a petitioner's claim. For example, if a petitioner fails to file a request for hearing within 90 days after filing a petition, the petition may be dismissed under Public Resources Code section 21167.4, subdivision (a). Like the request for hearing, the obligation to exhaust has been codified in the Public Resources Code. Specifically, section 21177 of the Public Resources Code requires (i) presentation of the alleged deficiency during the public comment period or prior to the close of the public hearing on the project, and (ii) that the petitioner object to the approval of the project during the public comment period or prior to the close of the public hearing on the project. (Pub. Resources Code, § 21177, subds. (a)-(b).) Courts regularly enforce these requirements and dismiss CEQA causes of action without leave to amend if the claimed deficiency was not exhausted or the named petitioner failed to exhaust.

Relying on section 21177 of the Public Resources Code, the City and BNSF attempted to sidestep a number of the Attorney General's challenges to the FEIR on the basis that they were not raised during the public comment period or prior to the close of the public hearing on the project. While it was undisputed that the issues were not raised during the administrative proceedings, the Court of Appeal concluded that in this case the failure to exhaust was not fatal.

Subdivision (d) of section 21177, states that "[t]his section does not apply to the Attorney General." The Court of Appeal found that under the statute's plain language, the Attorney General is exempt "from all statutory exhaustion requirements." Thus, while exhaustion is ordinarily the rule, for purposes of CEQA that rule does not apply to the Attorney General.

Adding Capacity Does Not Equate to Indirect Impacts

Under CEQA, the reasonably foreseeable indirect impacts of a project that result in physical changes to the environment must be analyzed. While the project would result in additional capacity at the existing BNSF rail yard, the FEIR explained that the assumption that freeing up capacity would lead to increased transportation demand was purely speculative, and therefore there was no reasonably foreseeable indirect impact that needed to be evaluated.

The Superior Court rejected the FEIR's explanation, finding that because the FEIR failed to analyze how the additional capacity at the existing BNSF rail yard would be utilized in the future, its analysis of indirect impacts was inadequate. As it did on the majority of the issues, however, the Court of Appeal concluded that the FEIR's explanation was supported by substantial evidence.

The Court of Appeal first debunked the assumption that additional capacity means increased activity, explaining that the record evidence actually demonstrated after BNSF had increased the capacity at its existing rail yard, transportation of cargo containers from that facility subsequently decreased. Thus, increased capacity does not equate to increased demand. The Court of Appeal also found that there was substantial evidence in the record to support the conclusion that "the project is not necessary to enable BNSF to service the projected growth" in cargo transportation demand given that the existing BNSF rail yard had additional capacity that was not being utilized.

Accordingly, the Court of Appeal found that the FEIR's conclusion on indirect impacts was supported by substantial evidence, reversing the Superior Court's finding on the issue.

<u>Increase In Greenhouse Gas Emissions Does Not Conflict With State Plan For Reduction of Greenhouse Gases</u>

When determining the significance of a project's Greenhouse gas emissions, the lead agency is supposed to consider, among other factors, the "extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions." (Cal Code Regs., tit. 14, § 15064.4, subd. (b)(3).) The FEIR concluded that BNSF's project is consistent with the applicable plans and policies, even though it would result in an overall increase in Greenhouse gas emissions from baseline levels, because it would also result in an increase in the fuel efficiency of regional cargo movement. The FEIR explained that this efficiency was achieved because there would be a reduction in the number of miles that cargo trucks would have to travel, as the project was located approximately 20 miles closer than the existing BNSF rail yard, and rail transport is more fuel efficient then truck transport.

The Superior Court found the FEIR's discussion on this issue inadequate, concluding that it failed to adequately inform the public or decision makers of the reason for the project consistency determination, and a "project that will increase [Greenhouse gas] emissions cannot be in harmony with state and local plans and policies that require a decrease in [Greenhouse gas] emissions." The Court of Appeal once again disagreed, distinguishing the FEIR's qualitative analysis from the quantitative analysis struck down by the California Supreme Court in *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204.

In *Center for Biological Diversity*, the lead agency concluded that because the housing project would achieve a 31 percent reduction from business as usual, the project was consistent with Assembly Bill 32's statewide goal of a 29 percent reduction from business as usual, and was therefore consistent with the applicable plan for reduction or

mitigation of greenhouse gas emissions. The California Supreme Court explained that while such a comparison could be appropriate, the environmental document in that case failed to connect the statewide standard to the specific type of development that was being proposed, and without that connection there was an analytical gap rendering the conclusion unsupported by substantial evidence.

In contrast with the quantitative analysis in *Center for Biological Diversity*, the FEIR employed a qualitative analysis based on the California Air Resources Board's scoping plan, which was developed in response to Assembly Bill 32, and promotes efficient transportation. The Court of Appeal found the FEIR's qualitative analysis adequate, explaining that it was "particularly apt in this instance where the no project alternative also results in significant impacts and is not consistent with conservation goals."

Accordingly, the Court of Appeal found the FEIR's conclusion on Greenhouse gas emissions was supported by substantial evidence, reversing the Superior Court's finding on the issue.

Use of Composite Air Quality Emissions Analysis Inappropriate In This Case

When analyzing the impacts of the project's operations on criteria pollutants, the FEIR analyzed emissions from operations in benchmark years 2016, 2023, 2035, 2046, and 2066, estimating peak daily unmitigated emissions for each year. The FEIR conducted the same analysis for the no-project alternative. The FEIR concluded that because the estimated emissions for these years would not exceed the applicable significance thresholds, the project and no-project alternatives would have a less than significant impact on air quality. To analyze the impacts of project operations on offsite ambient air pollution concentrations in the areas surrounding the project site, the FEIR modeled a single composite emissions scenario combining the peak year, peak day, or peak hour emissions by source category. The FEIR stated that this composite emissions analysis represented the hypothetical worst case scenario. Applying this analysis, the FEIR concluded that project operations will have a significant impact on air quality because ambient air pollutant concentrations would exceed thresholds established by the South Coast Air Quality Management District. The FEIR also concluded that the no-project alternative would exceed certain South Coast Air Quality Management District thresholds, but not all of the same thresholds exceeded by the project.

The Superior Court found the composite emissions analysis in the FEIR misleading and inadequate because it failed to disclose to the public and decision makers whether there would be an exceedance of a particular criteria pollutant at a particular time in a particular location. The Court of Appeal agreed in part, explaining that while the FEIR's analysis was not misleading, it was "incomplete."

The Court of Appeal explained that based on an analysis of the benchmark years, peak and average daily emissions for certain criteria pollutants will be lower under the project than the no-project, but the composite analysis shows that the concentration of certain criteria pollutants will in the worst case be three times greater under the project than under the no-project. Further, "the FEIR does not disclose or estimate, how frequently and for what length of time the level of particular air pollution in the area surrounding the

proposed rail yard will exceed the standard of significance." Thus, the Court of Appeal found that the decision to perform only a single composite emissions scenario failed to comply with CEQA's public disclosure and informational requirements.

Dispelling any suggestion that it was adopting a bright-line rule, the Court of Appeal also noted that while it found the composite approach inappropriate in this case, in other situations it may very well be appropriate to proceed with only a reasonable selection of benchmark years.

Air Quality Cumulative Impacts Analysis

In addition to the BNSF project, the FEIR disclosed that Union Pacific proposed to modernize and expand its existing rail yard, which is located adjacent to BNSF's proposed rail yard project. With respect to the Union Pacific project, the draft environmental impact report and recirculated draft environmental impact report contained specifics about the Union Pacific project, and the draft environmental impact report contained a combined analysis of the impacts of the two projects. This analysis was not included in the FEIR. Instead, the FEIR concluded that while a detailed analysis of the cumulative impacts of BNSF's project and Union Pacific's project is impracticable and unreasonable, it could reasonably be concluded that there would be a significant cumulative air quality impact. The Superior Court and the Court of Appeal both found that the FEIR's discussion, which omitted the analysis that appeared in the draft environmental impact report, was inadequate due to its superficial nature.

The Superior Court also found that there was no substantial evidence to support the FEIR's conclusion that the BNSF and Union Pacific projects would not result in a cumulatively significant impact on non-cancer risk. On this point, however, the Court of Appeal disagreed, explaining that the two projects are relatively similar, and that if the increased cancer risk from the BNSF project is also applied to the Union Pacific project, the cumulative cancer risk is below the threshold of significance. The Court of Appeal attributed the Superior Court's conclusion to the contrary to a mathematical error.

Conclusion

While there are a number of intriguing takeaways from the Court of Appeal's decision, such as the potential use of a qualitative efficiency analysis for purposes of analyzing consistency with State Greenhouse gas emissions reduction plans, the applicability of many of the Court's findings will depend on the specific type of project being evaluated. The Court, however, did set forth one bright-line rule that applies no matter the project. And that is, despite all the recognized benefits of requiring a petitioner to exhaust administrative remedies, when it comes to CEQA the Attorney General need not exhaust.

CALIFORNIA COURT COMPLICATES ENVIRONMENTAL BASELINE DETERMINATIONS

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Identifying the appropriate "baseline" from which to evaluate the environmental impacts of a transportation project is fraught with complexity. Courts find NEPA violations when an agency miscalculates the "no build" baseline or when the baseline assumes the existence of a proposed project. *See, e.g., Friends of Yosemite Valley v. Kempthorne,* 520 F.3d 1024, 1037-38 (9th Cir. 2008); *N.C. Alliance for Transp. Reform, Inc. v. United States DOT*, 151 F. Supp. 2d 661, 690 (M.D.N.C. 2001); *Sierra Club, Illinois Chapter v. United States Department of Transportation*, 962 F. Supp. 1037 (N.D. Ill. 1997). Courts have also invalidated a no build baseline where the future land use baseline is inconsistent with the land uses projected in the metropolitan transportation plan. *Openlands, Midewin Heritage Ass'n. v. U.S. Dep't of Transportation*, 124 F. Supp. 3d 796 (N.D. Ill. 2015).

In *John R. Lawson Rock & Oil, Inc. v. State Air Resources Board,* Case No. F074003, 2018 WL 636063 (Jan. 31, 2018) ("*Lawson Rock & Oil*"), the California Court of Appeal adds additional complexity to the law governing the environmental baseline. The court upheld the use of an air quality baseline that excluded certain emission reductions from trucks and buses required (but not yet achieved) by an air quality regulation. Although decided under state law, the court's reasoning has potential implications for cases that arise under the National Environmental Policy Act ("NEPA").

Many transportation projects raise complex baseline issues similar to the issues in *Lawson Rock & Oil.* For example, transportation agencies commonly assume future, but not yet built, land uses (and resulting traffic and air quality impacts) in the No Action Alternative baseline against which each of the action alternatives is judged. The federal circuits are split on the showing required to support the use of a No Action Alternative baseline that assumes the impacts of future land uses in the area of a proposed transportation project. (Compare *Laguna Greenbelt v. U.S. Dep't of Transp.* (9th Cir. 1994) 42 F.3d 517, 525 with *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, 677 F.3d at 605.)

NEPA and its California state law parallel (the California Environmental Quality Act) require the lead agency to evaluate the potential impacts of an agency action against a No Action or No Project "baseline" Alternative. (*Friends of Yosemite Valley v. Kempthorne,* 520 F.3d at 1037-1038.) With certain exceptions, California law requires agencies to evaluate a project's environmental impacts against a baseline of conditions in existence at the time of the project approval. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447-457.) The California

decisions leave unclear to what extent the environmental baseline should include changes to conditions required by *existing* regulations where the changes are not achieved as of the date of project approval.

In *Lawson Rock & Oil,* the plaintiffs challenged a state regulation that proposed to *delay* the implementation of an existing air quality regulation designed to reduce emissions from trucks and buses. The air quality baseline adopted by the agency *excluded future emission reductions required for many small truck and bus fleet operators from the baseline.* Although these reductions are required by existing law, the agency reasoned that because they have not yet been achieved, the agency was not required to account for those potential, future reductions in its baseline for air quality. The effect of the agency-adopted baseline was that it reduced the air quality impacts of the agency proposal to delay regulatory requirements. Plaintiffs argued that the baseline adopted by the State Air Resources Board created a "fictional universe" in which the excluded emission reduction regulations did not exist, and then improperly measured the policy delay impacts against this fictional universe.

The court concluded that the State Air Resources Board had the discretion to select a baseline "that measured the current environment without further reducing figures based on regulations that should have taken effect during the course of the analysis." The court relied on an earlier California Supreme Court decision holding that an air quality management agency violated the California Environmental Quality Act by selecting a baseline that assumed the maximum permitted operation of the refinery boilers even though the refinery had never operated the boilers to the maximum level authorized in the air quality permit. The court specifically noted that, "[b]y adopting as a baseline the current environmental conditions, the Board did take into account the applicable laws and regulations as they had affected the environment to that point in time." In concluding that the State Air Resources Board appropriately used its discretion to select a proper baseline that excluded the regulations that only had speculative, future effects on emissions, the court pointed out that the laws and regulations requiring reductions were not retroactively excluded from the baseline analysis.

CASE SUMMARIES

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1. Obtaining Local Consent for Alternative in Minnesota Transit Extension Does Not Prejudge NEPA

A group of Plaintiffs who were opposed to a chosen alternative for the southwest extension of a suburban Minneapolis transit project argued that the project sponsor had prejudiced the choice of the preferred alternative. They argued that the sponsor had gone ahead and secured the approval of the local communities before the NEPA process had been completed. On review the Court noted that the local consent agreements were nonbinding. They could be changed and had been changed. Also,

the local agreements were not binding on FTA, the agency charged with compliance with NEPA. The Court characterized the local consent agreements as "promises that can be broken." Consequently, securing the local consent agreements did not prejudge FTA's decision under NEPA.

Lakes and Parks Alliance v. The Metropolitan Council, D. Minn. #14-3391, February 27, 2018

2. New Flight Path for Reagan National Must be Challenged When Approved, Not When Implemented

In December, 2013 FAA approved a new flight path for planes approaching and leaving Reagan National Airport. The new flight path passed closer to the Georgetown neighborhood. The pilots were hesitant to use the new flight path and did not follow it until charts were published that showed the new routes in 2015. Georgetown University and the neighbors (hereinafter referred to as The Hoyas) challenged the FAA's decision. The Court ruled that appeals of FAA decisions like this one had to be filed within 60 days of their approval. The 60 days started to run in 2013 so The Hoyas appeal was untimely.

Citizens Association of Georgetown v. FAA, D.C. Circuit No. 15-1285, March 27, 2018

NOTES FROM THE CHAIR

Submitted by

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Greetings reader! What a wonderful way to start our year together in the TRB Environmental Issues in Transportation Law Committee. We contributed in two excellent panels at the Annual TRB Meeting—P3s and NEPA: Strategies for Addressing Environmental Impact Review in an Era of Streamlining and Getting Lawyers Comfortable Thinking Outside the Box. I would like to thank the Committee members who developed the program and identified the panel participants. I would also like to thank the Committee members and friends that participated and supported these events. The success of these events and the opportunity to contribute programs to the conference is highly dependent on your participation and interest in these. Thank you!

We had a good Committee meeting at the Annual Conference. We have identified some wonderful programs for the next six months. Up first will be a webinar on Establishing and Enforcing Page Limits for Environmental Impact Statements on April 18. At the Legal Workshop this July in Cambridge, Massachusetts we plan to have three programs for you. I know the Committee members developing the program have identified some excellent speakers and are very excited to deliver the program for you. I hope to see you all there.

There are some interesting developments in our legal area. This February we got to see the Trump Administration's Infrastructure Plan. We have an article in this edition for your reading pleasure. We should also be monitoring a few significant environmental cases that may have ramifications in transportation law. The first is the Supreme Court's decision and subsequent lower court decisions with regards to "Waters of the U.S." Shortly after our Annual Conference, the Supreme Court ruled that Federal District Courts, not U.S. Court of Appeals, had original jurisdiction over challenges to the Clean Water rule in National Association of Manufacturers v. Department of Defense et al., 138 S. Ct. 617 (2018). This paves the way for multiple district courts to hear challenges on the U.S. Environmental Protection Agency (USEPA) and U.S. Army Corps of Engineers rule defining waters of the U.S. It will be interesting (albeit challenging) to see how this pans out in multiple jurisdictions.

Another case in our radar is the recent U.S. Court of Appeals for the D.C. Circuit decision to vacate portions of USEPA's 2008 ozone rule that dealt with the revocation of the 1997 National Ambient Air Quality Standards for ozone. *South Coast Air Quality Management District v. EPA*, et al., No. 15-1115 (D.C. Cir. decided Feb. 16, 2018). Other Supreme Court cases of interest include *U.S. v. Washington*., 853 F.3d 946 (9th Cir. 2017) *cert. granted* by *Washington v. U.S.,* 138 S. Ct. 735 (Jan. 12, 2018) (Washington culverts and Tribal treaty-protected fishing rights case) and *Markle Interests v. FWS*, 827 F.3d 452 (5th Cir. 2016) *cert. granted* by *Weyerhauser Co. v. FWS*, 138 S. Ct. 924 (Jan. 22, 2018) (on critical habitat designations). Hopefully we will have some of you write about these.

What a great time to be a Committee friend and member! I hope you enjoy the ride!

NEXT DEADLINE IS JUNE 15, 2018

The next deadline for submission of articles for *The Natural Lawyer* is June 15, 2018. Send material to Richard.christopher@hdrinc.com, and please use Microsoft Word.